

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**IN RE: BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION**

MDL. NO. 2406

Master File No. 2:13-CV-20000-RDP

**This document relates to:
Subscriber Track cases**

**SUBSCRIBER PLAINTIFFS' EXECUTIVE SUMMARY OF
MERITS EXPERT REPORTS**

Professor Christy Chapin

1. Professor Christy Chapin (“Chapin”) is an associate professor in the history department at the University of Maryland Baltimore County (“UMBC”) where she is also affiliated with the School of Public Policy. She is a visiting scholar at the Robert H. Smith School of Business at the University of Maryland and a fellow at the Institute for Applied Economics, Global Health, and the Study of Business Enterprise at Johns Hopkins University. She received a doctorate degree in history at the University of Virginia and a B.A. in Government from William and Mary. At UMBC, she teaches courses in business, economic, and political history. She serves on the editorial boards of *Enterprise & Society* and the *Journal of Policy History*, both of which are peer-reviewed academic journals published by Cambridge University Press.

2. Chapin’s book, *Ensuring America’s Health: The Public Construction of the Corporate Health Care System*, published in 2015 by Cambridge University Press, examines how insurance companies developed over the twentieth century and into the twenty-first century to assume a central role in the United States health care system. The book includes in-depth case studies of three professional and trade associations: the American Medical Association, which represents physicians; the Health Insurance Association of America, which represents commercial or for-profit insurance companies; and the Blue Cross and Blue Shield Associations (“BCBSA”). The book won the Business History Conference’s annual prize for the best book exploring the theme of how business enterprise has shaped the economic conditions of a country. Chapin’s published articles and essays have covered a variety of topics, including the United States health care system, trade associations, and health insurance companies.

3. Chapin was asked by Subscriber Plaintiffs' counsel to determine to compare the ordinary custom and practice of trade associations in the United States with those of BCBSA. She concludes that BCBSA has acted in a manner inconsistent such customs and practices, for the following reasons.

4. *First*, unlike a typical trade association, BCBSA's membership is not open to all companies that are horizontal to one another within the industry's supply chain. *Second*, BCBSA exerts operational control over its Member Plans, requiring them to operate only in exclusive service areas ("ESAS") and placing revenue caps on non-branded business. *Third*, BCBSA requires Member Plans to provide detailed information concerning their financial and business operations for purposes of monitoring of compliance with those rules. *Fourth*, BCBSA punishes its Member Plans who fall out of compliance with those requirements. All of these actions are inconsistent with how a traditional U.S. trade association operates.

Professor Ariel Pakes

1. **Professor Ariel Pakes** ("Pakes") submitted an expert report on class certification on April 15, 2019 (and an amended report on April 26, 2019). The summary submitted with Pakes' class certification report (ECF No. 2411) is hereby incorporated by reference. His merits expert report contains substantially the same discussion with some additions. The principal difference between Pakes' class certification report and the present one is that in his prior report, he demonstrated the feasibility of his simulation model of damages, using data for 2010, and in his present report, he models damages for the entire Class Period.

Louis T. Pirkey

1. **Louis Pirkey** ("Pirkey") graduated from law school in 1964 and has practiced exclusively in the field of intellectual property law. For over 40 years, his practice has been

focused almost exclusively on trademark law. That practice includes all phases of trademark law but has been especially focused on litigation in the federal courts around the United States and the United States Patent and Trademark Office. He has handled multiple matters include 3M, ExxonMobil, University of Texas institutions, Shell Oil Company, The Pillsbury Company, Baylor University, Medtronic, Inc., HEB Grocery Company and T.G.I. Friday's. The cases he has handled for these companies, and many others, have involved many different issues of trademark law, including acquisition of rights and abandonment. During the course of Pirkey's career, he has successfully tried many trademark infringement cases, both to juries and in bench trials, as well as numerous preliminary injunction motions, which are common in trademark cases. His practice has also included counseling and opinions on trademark law issues. Pirkey has served as President of the American Intellectual Property Law Association.

2. Subscriber Plaintiffs' counsel asked Pirkey to opine on whether the facts of this case are consistent with abandonment of trademarks. He has extensively reviewed the record in this litigation relevant to this topic.

3. Based on that review, Pirkey opines that the Minnesota Plan, which owned common law rights in the Blue Cross Marks, allowed use of those marks by other Plans without a license agreement and with no quality control of the other Plans for years after the first use of those marks. He further opines that that the Buffalo Plan, which owned common law rights in the Blue Shield Marks, allowed use of those marks by other Plans without a license agreement and with no quality control of the other Plans for years after the first use of those marks.

4. It is Pirkey's opinion that the facts of this case are consistent with a finding that: (i) the Blue Cross Marks were abandoned prior to 1947 by naked licensing of the marks and (ii) the Blue Shield Marks were abandoned prior to 1949 by naked licensing of the marks.

Professor Daniel Rubinfeld

1. **Professor Daniel Rubinfeld** (“Rubinfeld”) submitted an expert report on class certification on April 15, 2019. The summary submitted with Rubinfeld’s class certification report (ECF No. 2411) is hereby incorporated by reference. His merits expert report contains substantially the same discussion with some additions. The principal differences between that report and the present one are that (a) the present report focuses on the merits of Subscriber Plaintiffs’ claims rather than on class certification and (b) includes additional discussion of the evidentiary record in this case, including materials recently produced from the *Anthem/Cigna* merger litigation.

Leslie Strassberg

1. **Leslie Strassberg** (“Strassberg”) is the Chief Financial Officer (“CFO”) of b.well Connected Health (“b.well”), a healthcare startup company that provides personal health management software tools to health insurance companies, health systems, and self-insured employers. In addition to its healthcare tools and services, b.well has also sought to offer insurance products in a number of states, and as its CFO, Strassberg has been responsible for identifying those opportunities and developing business plans to establish insurance operations. Between July of 1984 and July of 1989, he was Vice President for Underwriting and Administration at Empire Blue Cross Blue Shield (“EBCBS”). While at EBCBS, he served on a team that developed and implemented an expansion plan into Orange County of New York. Strassberg previously submitted a declaration in connection with the parties’ summary judgment briefing on application of a *per se* standard.

2. Strassberg has been asked by Subscriber Plaintiffs’ counsel to opine on the attractiveness of the Alabama commercial insurance market for entry by another Blue Plan

(either on a Blue or Green basis) in 2005 and throughout the Class Period (April 17, 2008 to December 31, 2013) for the proposed Alabama Damages Class. He has reviewed both publicly available documents and documents produced in this litigation in reaching his conclusions. Strassberg finds that the market for health insurance in the state of Alabama is an attractive one for entry by a Blue or Green competitor and was also attractive for entry in 2005 and during the Class Period. Strassberg further finds that Blue Cross Blue Shield of Alabama (“BCBSAL”) is the dominant health insurance company in Alabama, because it not only maintains a dominant share of the market, but it also currently faces little competition. Generally speaking, market participants view this lack of competition as likely to breed complacency, inefficiency, and an absence of innovation.

3. Strassberg finds that BCBSAL accumulated over **\$1.1 billion in surplus** over the Class Period. Strassberg finds BCBSAL earned substantial profits over the last 17 years, also making Alabama an attractive candidate for a new market entrant.

4. Strassberg also notes that BCBSAL excessively compensates its executives, such that even as a “non-profit”, BCBSAL’ executives are compensated more than their counterparts at for-profit insurers. He also finds that BCBSAL executives’ explosive compensation growth (150% between 2008 and 2015) is not justified by growth, as during that same period, BCBS-AL had the slowest revenue growth of its comparable peer companies.

5. Stassberg further finds that neighboring Blues would be well positioned to enter Alabama and offer health insurance to subscribers, whether as a Blue or a Green.

This the 15th day of May, 2019

Charles J. Cooper – ***Co-Chair, Written Submissions Committee***
COOPER & KIRK, PLLC
1523 New Hampshire Avenue NW
Washington, DC 20036
Tel: (202) 220-9600
Fax: (202) 220-9601
ccooper@cooperkirk.com

David Boies – ***Co-Lead Counsel***
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
Tel: (914) 749-8200
Fax: (914) 749-8300
dboies@bsflp.com

David Guin – ***Co-Chair, Written Submissions Committee***
Tammy Stokes – ***Damages Committee***
GUIN, STOKES & EVANS, LLC
300 Richard Arrington Jr. Blvd. North
Suite 600>Title Building
Birmingham, AL 35203
Tel: (205) 226-2282
Fax: (205) 226-2357
davidg@gseattorneys.com
tammys@gseattorneys.com

Gregory Davis – ***Settlement Committee & PSC Member***
DAVIS & TALIAFERRO, LLC
7031 Halcyon Park Drive
Montgomery, AL 36117
Tel: (334) 832-9080
Fax: (334) 409-7001
gldavis@knology.net

/s/ Chris Hellums
Chris T. Hellums – ***Local Facilitating Counsel***
PITTMAN, DUTTON & HELLUMS, P.C.
2001 Park Place N, 1100 Park Place Tower
Birmingham, AL 35203
Tel: (205) 322-8880
Fax: (205) 328-2711
chrish@pittmandutton.com

Michael Hausfeld – ***Co-Lead Counsel***
Swathi Bojedla
HAUSFELD LLP
1700 K Street NW, Suite 650
Washington, DC 20006
Tel: (202) 540-7200
Fax: (202) 540-7201
mhausfeld@hausfeldllp.com
sbojedla@hausfeldllp.com

William A. Isaacson – ***Settlement Committee & PSC Member***
BOIES, SCHILLER & FLEXNER LLP
1401 New York Ave, NW
Washington, DC 20005
Tel: (202) 237-2727
Fax: (202) 237-6131
wisaacson@bsflp.com

Megan Jones – ***Settlement Committee & PSC Member***
Arthur Bailey – ***Discovery Committee***
HAUSFELD LLP
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Tel: (415) 633-1908
Fax: (415) 358-4980
mjones@hausfeldllp.com
abailey@hausfeldllp.com

Kathleen Chavez – ***Settlement Committee & PSC Member***
FOOTE, MIELKE, CHAVEZ & O’NEIL,
LLC
10 West State Street, Suite 200
Geneva, IL 60134
Tel: (630) 797-3339
Fax: (630) 232-7452
kcc@fmcolaw.com

Eric L. Cramer – ***Expert Committee***
BERGER & MONTAGUE, P.C.
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Tel: 1-800-424-6690
Fax: (215) 875-4604
ecramer@bm.net

Patrick Cafferty – ***Discovery Committee***
CAFFERTY CLOBES MERIWETHER &
SPRENGEL LLP
220 Collingwood, Suite 130
Ann Arbor, MI 48104
Tel: (734) 769-2144
Fax: (734) 769-1207
pccafferty@caffertyclobes.com

Douglas Dellaccio – ***Litigation Committee***
CORY WATSON, P.C.
2131 Magnolia Avenue, Suite 200
Birmingham, AL 32505
Tel: (205) 328-2200
Fax: (205) 324-7896
ddellaccio@cwcd.com

Cyril V. Smith – ***Settlement Committee & PSC Member***
ZUCKERMAN SPAEDER, LLP
100 East Pratt Street, Suite 2440
Baltimore, MD 21202-1031
Tel: (410) 949-1145
Fax: (410) 659-0436
csmith@zuckerman.com

Richard Feinstein – ***Expert Committee***
Hamish P.M. Hume – ***Discovery Committee***
BOIES, SCHILLER & FLEXNER LLP
1401 New York Ave, NW
Washington, DC 20005
Tel: (202) 237-2727
Fax: (202) 237-6131
rfeinstein@bsfllp.com
hhume@bsfllp.com

Bryan Clobes – ***Litigation Committee***
Ellen Meriwether – ***Written Submissions Committee***
CAFFERTY CLOBES MERIWETHER &
SPRENGEL LLP
205 N. Monroe St.
Media, PA 19063
Tel: (215) 864-2800
Fax: (215) 864-2810
bclobes@caffertyclobes.com
meriwether@caffertyclobes.com

Chris Cowan – ***Damages Committee***
THE COWAN LAW FIRM
4500 N Versailles Ave
Dallas, TX 75205-3015
Tel: (214) 826-1900
Fax: (214) 826-8900
chris@cowanlaw.net

Edwin J. Kilpela, Jr.
Benjamin Sweet – **Litigation Committee**
CARLSON LYNCH SWEET KILPELA &
CARPENTER LLP
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
Tel: 412-322-9243
Fax: 412-231-0246
ekilpela@carlsonlynch.com
bsweet@carlsonlynch.com

Charles T. Caliendo – **Class Certification Committee**
GRANT & EISENHOFER
485 Lexington Avenue, 29th Floor
New York, NY 10017
Tel: (646) 722-8500
Fax: (646) 722-8501
ccaliendo@gelaw.com

Daniel Gustafson – **Litigation Committee**
Daniel C. Hedlund – **Damages Committee**
GUSTAFSON GLUEK PLLC
120 South Sixth Street, Suite 2600
Minneapolis, MN 55402
Tel: (612) 333-8844
Fax: (612) 339-6622
dgustafson@gustafsongluek.com
dhedlund@gustafsongluek.com

John Saxon – **Litigation Committee**
JOHN D. SAXON, P.C.
2119 3rd Avenue North
Birmingham, AL 35203-3314
Tel: (205) 324-0223
Fax: (205) 323-1583
jsaxon@saxonattorneys.com

Robert M. Foote – **Damages Committee**
FOOTE, MIELKE, CHAVEZ & O'NEIL, LLC
10 West State Street, Suite 200
Geneva, IL 60134
Tel: (630) 797-3339
Fax: (630) 232-7452
rmf@fmcolaw.com

Robert Eisler – **Discovery Committee**
GRANT & EISENHOFER
123 Justison Street, 17th Floor
Wilmington, DE 19801
Tel: (302) 622-7000
Fax: (302) 622-7100
reisler@gelaw.com

Brent Hazzard – **Litigation Committee**
HAZZARD LAW, LLC
447 Northpark Drive
Ridgeland, MS 39157
Tel: (601) 977-5253
Fax: (601) 977-5236
brenthazzard@yahoo.com

Lawrence Jones – **Damages Committee**
JONES WARD PLC
1205 E. Washington St., Suite 111
Louisville, KY 40202
Tel: (502) 882-6000
larry@jonesward.com

Andrew Lemmon – ***Chair, Discovery Committee***
LEMMON LAW FIRM
15058 River Road
PO Box 904
Hahnville, LA 70057
Tel: (985) 783-6789
Fax: (985) 783-1333
andrew@lemonn法律firm.com

Robert Methvin – ***Chair, Settlement Committee***
James M. Terrell – ***Class Certification Committee***
METHVIN, TERRELL, YANCEY,
STEPHENS & MILLER, P.C.
The Highland Building
2201 Arlington Avenue South
Birmingham, AL 35205
Tel: (205) 939-0199
Fax: (205) 939-0399
rgm@mmlaw.net
jterrell@mmlaw.net

H. Lewis Gillis – ***Co-Head Chair, Litigation Committee***
MEANS GILLIS LAW, PC
60 Commerce Street, Suite 200
Montgomery, AL 36104
Tel: 1-800-626-9684
hlgillis@tmgslaw.com

Dianne M. Nast – ***Class Certification Committee***
NASTLAW LLC
1101 Market Street, Suite 2801
Philadelphia, PA 19107
Tel: (215) 923-9300
Fax: (215) 923-9302
dnast@nastlaw.com

Virginia Buchanan – ***Chair, Class Certification Committee***
LEVIN PAPANTONIO THOMAS MITCHELL
RAFFERTY & PROCTOR, P.A.
316 South Baylen Street, Suite 600
Pensacola, FL 32502
Tel: (850) 435-7000
Fax: (850) 435-7020
vbuchanan@levinlaw.com

Michael McGartland – ***Class Certification Committee***
MCGARTLAND LAW FIRM, PLLC
1300 South University Drive, Suite 500
Fort Worth, TX 76107
Tel: (817) 332-9300
Fax: (817) 332-9301
mike@mgartland.com

David J. Hodge – ***Chair, Settlement Committee***
MORRIS, KING & HODGE
200 Pratt Avenue NE
Huntsville, AL 35801
Tel: (256) 536-0588
Fax: (256) 533-1504
dhodge@mkhlawyers.com

Patrick W. Pendley – ***Chair, Damages Committee***
Christopher Coffin – ***State Liaison Committee***
PENDLEY, BAUDIN & COFFIN, LLP
Post Office Drawer 71
Plaquemine, LA 70765
Tel: (225) 687-6369
Fax: (225) 687-6398
pwpendley@pbclawfirm.com
ccoffin@pbclawfirm.com

Edgar D. Gankendorff – ***Co-Head Chair, Litigation Committee***
Eric R.G. Belin – ***Damages Committee***
PROVOSTY & GANKENDORFF, LLC
650 Poydras Street, Suite 2700
New Orleans, LA 70130
Tel: (504) 410-2795
Fax: (504) 410-2796
egankendorff@provostylaw.com
ebelin@provostylaw.com

Garrett Blanchfield – ***Written Submissions Committee***
REINHARDT, WENDORF & BLANCHFIELD
W-1050 First National Bank Building
332 Minnesota Street
St. Paul, MN 55101
Tel: (651) 287-2100
Fax: (651) 287-2103
g.blanchfield@rwblawfirm.com

Larry McDevitt – ***Chair, Class Certification Committee***
David Wilkerson – ***Discovery Committee***
VAN WINKLE LAW FIRM
11 North Market Street
Asheville, NC 28801
Tel: (828) 258-2991
lmcdevitt@vwlawfirm.com
dwilkerson@vwlawfirm.com

Richard Rouco – ***Written Submissions Committee***
QUINN, CONNOR, WEAVER, DAVIES & ROUCO LLP
2 20th Street North, Suite 930
Birmingham, Alabama 35203
Tel: (205) 870-9989
Fax: (205) 803-4143
rrouco@qcwdr.com

Jason Thompson – ***Damages Committee***
SOMMERS SCHWARTZ
One Towne Square, 17th Floor
Southfield, MI 48076
Tel: (248) 355-0300
jthompson@sommerspc.com

Carl S. Kravitz – ***Expert Committee***
ZUCKERMAN SPAEDER LLP
1800 M Street NW, Suite 1000
Washington, DC 20036-5807
Tel: (202) 778-1800
Fax: (202) 822-8106
c.kravitz@zuckerman.com

Subscriber Plaintiff Co-Lead Counsel and Committee Chairs and Members

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, the foregoing was served on all counsel of record via CM/ECF.

/s/ Chris Hellums
Chris T. Hellums
Local Facilitating Counsel for Subscriber Plaintiffs